No. 95-227
(Consolidated with No. 95-124)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ALLIANCE FOR COMMUNITY MEDIA, ALLIANCE FOR COMMUNICATIONS DEMOCRACY, AND PEOPLE FOR THE AMERICAN WAY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS ALLIANCE FOR COMMUNITY MEDIA, ALLIANCE FOR COMMUNICATIONS DEMOCRACY, AND PEOPLE FOR THE AMERICAN WAY

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ARGUMENT

We showed in our opening brief that Section 10 and its implementing regulations, which on their face disadvantage speech based on its content, involve state action, and cannot withstand strict First Amendment scrutiny. The federal respondents ("the United States" or "the government"), after insisting before the court below and in opposing the writ of certiorari that Sections 10(a) and 10(c) involve no state action, now acknowledge that state action inheres in the enactment of these content-based provisions, and that they must, therefore, be evaluated under the First Amendment. Having offered that

concession, however, the government retreats under cover of several new arguments, asserting for the first time, for example, that Sections 10(a) and 10(c) should be evaluated under a new standard of scrutiny akin to "rational basis," rather than the strict scrutiny this Court has long applied to content-based regulations. Further, again in contravention of this Court's precedents, the government advocates that this Court ignore the fundamental differences between the cable and broadcast mediums, and apply a lesser, but unspecified, standard of scrutiny to Section 10(b)'s mandatory cable blocking scheme. The government also tries to rewrite the history of access channels, as it refuses to acknowledge that public access channels and the concomitant prohibition on editorial discretion by cable operators are creatures of local governments' cable franchise agreements that pre-date all federal legislation in this area.

We demonstrate below that regardless what route is taken to the state action destination, strict First Amendment scrutiny must be applied to the content-based statute at issue here. Section 10 cannot withstand such scrutiny, and, for that reason, the statute and regulations should be declared unconstitutional.

I. SECTION 10 IS SUBJECT TO FIRST AMENDMENT SCRUTINY.

In our opening brief, we explained that Section 10 is subject to scrutiny under the First Amendment for four *independent* reasons: (1) Congress's enactment of a statutory scheme that disadvantages speech based upon its content demands First Amendment scrutiny; (2) Section 10's preemption of all contrary state laws and local franchise agreements that would otherwise prevent cable operators' censorship implicates state action; (3) the statute and regulations significantly encourage the prohibition of indecent programming by cable operators; and (4) public access channels are public fora that cannot be subjected to content-based regulation in contravention of the First Amendment. As we show below, no respondent or amicus provides any basis to reject any of these arguments, and the United States in fact concedes the merits of several of them.

A. Congress's Enactment of a Content-Based Law Is Subject to Strict Scrutiny Under the First Amendment.

Congress's enactment of a law like Section 10 that on its face disfavors certain categories of speech based upon content is state action subject to First Amendment scrutiny. The United States concedes this, noting (at 24) that "state action does inhere in Congress's enactment" of Section 10, which it further acknowledges (at 25) "distinguish[es] among categories of speech based on content." The government agrees (at 10), therefore, that Section 10 "must be consistent with the First Amendment." Thus, the United States has disavowed the reasoning of the *in banc* court below.

Unlike the United States, however, the National Cable Television Association ("NCTA") (at 6) and amicus Time Warner (at 8-9) continue to argue that Section 10's content-based regulation of speech may evade constitutional scrutiny entirely because Sections 10(a) and 10(c) "restore" editorial freedom to cable operators. As we showed in our opening brief (at 23-24), this "restoration" argument is flawed both factually, because cable operators typically never had such discretion in the first place,[1] and legally, because Congress's singling out of a particular category of speech for special treatment based upon its content, while treating all other speech differently, is precisely the type of *action* by the *state* that requires constitutional scrutiny.

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[1]As we explained in our opening brief (at 4-6 & n.5), and despite amici statements to the contrary, access channels date back to the 1960s, and a fundamental characteristic of these channels was freedom from editorial interference by the cable operator. In addition, also despite amici statements to the contrary, leased access predated the 1984 Act as well. Time Warner's New York City cable system has been required to provide leased access since the 1970's, see *e.g.*, 3 Charles D. Ferris *et al.*, *Cable Television Law: A Video Communications Practice Guide* C-457 (1994), and 365 cable systems offered leased access by 1982. Daniel L. Brenner *et al.*, *Cable Television and Other Nonbroadcast Video* § 6.05[2] n.11 (1995).

B. The Preemptive Effect of Section 10 Implicates State Action.

Relying on this Court's decision in *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956), we explained in our opening brief (at 24-27) that federal statutes and regulations that, like Section 10, preempt contrary state and local laws that would otherwise prevent a private actor's conduct, give rise to state action and are subject to constitutional scrutiny. The government, in its brief in opposition, also concedes this point, admitting first (at 21) that Section 10 preempts all contrary laws and private agreements,[2] and second (at 20) that Section 10 is subject to First Amendment scrutiny: "the holding in *Hanson* is entirely consistent with our position in this case," namely that "the statutory grant of permissive authority to cable operators to [prohibit indecent programming] *must be consistent with the First Amendment*." (Emphasis added.)[3]

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[2] See United States' Br. at 21 ("*like the provisions at issue* in this case," the federal regulations in "*Skinner* preempted state law or private agreements to the contrary") (emphasis added). In contrast to this forthright concession, the government, earlier in its brief (at 18), obliquely suggests that "the preemptive effects of Sections 10(a) and 10(c) are not appropriately resolved in this facial challenge to Section 10." There simply cannot be any question, however, about Section 10's preemptive effect: "if the FCC has resolved to pre-empt an area of cable television regulation and if this determination 'represents a reasonable accommodation of conflicting policies' that are within the agency's domain, we must conclude that all conflicting state regulations have been precluded." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984).

[3] Although this Court need not reach the issue to find state action, the government is wrong when it asserts (at 18-20) that *Hanson* does not support the further proposition that a private cable operator's decision to ban indecent speech may be treated as the state's. Like the privately-negotiated union shop agreement at issue in *Hanson*, the decision by a private cable operator to censor indecent programming carries "the imprimatur of the federal law upon it," since it "could not be made illegal nor vitiated by any provision of the laws of a State." 351 U.S. at 232; see also *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 761 (1988). Thus, because the only reason that a private cable operator can now censor indecent programming is Section 10's preemption of all state and local legal impediments, that censorship may be attributed to the state.

C. Section 10 Significantly Encourages the Censorship of Indecent Programming.

Even though the FCC states that "the purpose[] underlying Section 10 as a whole [is] reducing the exposure of viewers, especially children, to 'indecent' programming on cable access channels," App. 187a, the United States argues that Section 10 does not significantly encourage that result. In our opening brief, however, we demonstrated that Section 10 accomplishes its statutory purpose by encouraging cable operators to ban indecent programming, and as this Court held in *Skinner* v. *RLEA*, 489 U.S. 602 (1989), such "significant encouragement" constitutes state action. In this regard, we noted the similarities between the present facts and *Skinner*, where this Court found state action in regulations that authorized, but did not compel, drug-testing of railroad employees. The United States seeks to avoid the obvious implications of *Skinner* by suggesting first (at 13-17) that "nothing in Section 10" encourages cable operators to ban indecent programming – a curious suggestion, given Section 10's purpose – and second (at 20-22) that the *Skinner* facts were more egregious. As we show below, both of these contentions are wrong.

As the *Skinner* Court cautioned, in the search for significant encouragement, no single aspect of the regulations may be viewed in isolation. Instead, the cumulative effect of the "specific features of the regulations" must be assessed in order to ascertain whether the government has done more than simply "adopt a passive position toward the underlying private conduct." 489 U.S. at 615. The United States ignores this admonition and instead singles out each of the Section 10 subsections for separate analysis. As an example, the United States contends (at 14) that Senator Helms' statement – Section 10 was intended to "put an end to the kind of things going on in New York and elsewhere" – was made with regard to only subsection (d), not subsections (a) or (c), and thus has no relevance. The fact that Senator Helms may have made his statement with subsection (d) in mind does not undermine its import, however, since subsection (d)'s revocation of operator

immunity has the effect of encouraging – if not coercing – operators into banning indecent speech to avoid liability.[4]

As we explained in our opening brief (at 29-30), Congress's decision to revoke cable operators' immunity for any speech that "involves obscene material" encourages operators to censor broadly in order to avoid liability. The United States contends (at 15-16) that this feature of the 1992 Cable Act adds little to any state action argument because, as they put it, "'[s]ome *self*-censorship is an inevitable result of all obscenity laws.'" (Emphasis added.) This statement, however, mischaracterizes the nature of access channels. Cable operators, when they act pursuant to subsections 10(a) and 10(c), will not be censoring their *own* speech, but rather that of members of the public and other unaffiliated entities. While a cable operator concerned about liability has an incentive not to over-censor when its own speech is at stake, it has no such incentive with regard to the public's speech, which it would prefer not to transmit in the first place. See, *e.g.*, *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525, 530 (1959); *cf. Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2466 (1994) (because cable operator "can . . . silence the voice of competing speakers with a mere flick of the switch," there is "potential for abuse of this private power"). Indeed, given that access programmers have always been liable for any obscenity appearing in their programming, see 47 U.S.C. § 559, it is difficult to imagine why Congress would now impose liability on the cable operator *as well* for the access programmer's speech unless Congress intended to encourage the cable operator to use its new censorship powers.[5]

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[4] The United States also argues (at 14) that the "fact that individual Members of Congress may have expressed hope that operators would prohibit indecent programming . . . is of little relevance." While the United States may believe that the statements of a bill's sponsor, such as Senator Helms, are "of little relevance," this Court has not agreed. As was stated in *Bowsher* v. *Merck & Co.*, 460 U.S. 824 (1983), "the explanation of the sponsor of the language, is an 'authoritative guide to the statute's construction.'" *Id.* at 832.

[5] In its amicus brief to this Court (at 18-19), Time Warner, like the United States, takes the position that we "overstate the effect of § 10(d)." This reflects a rather dramatic change of heart on Time Warner's part, however.

Citing to record evidence, we also showed (at 29 & n.19) how another provision of the interrelated Section 10 scheme – the subsection (b) blocking scheme – would spur private cable operators to ban indecent programming. In this regard, we noted that when faced with the choice between simply keeping indecent material off cable or shouldering the added burden of a separate blocked channel, the operator would be far more likely to choose to ban the material. The government's only answer to these record facts about access channels is to cite (at 16) to the *in banc* court's reference to *non*-access channels. This Court need not, however, rely on extra-record suppositions about other types of cable channels, since the record below is replete with proof of the burdensome aspects of blocking *access* channels. For example, as the FCC itself acknowledged: "We are aware that implementation of [Section 10(b)'s] new blocking requirements *may be difficult* . . . and that the new requirement may require *considerable adjustments* by some cable systems . . . ." App. 165a (emphasis added); see also J.A. 231 (comment of operator: "[s]crambling a normally unscrambled channel requires a significant amount of time and labor"). Thus, operators likely will likely ban all indecent programming, in order to avoid this "significant amount of time and labor."[6]

Time Warner is in fact challenging the constitutionality of subsection (d) in separate litigation, and in its brief to the D.C. Circuit, Time Warner argues exactly that which we now contend: that pursuant to subsections (a) and (c), cable operators will "refuse to carry speech that may in fact be constitutionally protected" to avoid liability under subsection (d). Reply Brief of Appellant Time Warner, Inc., at 44, *Time Warner* v. *FCC*, No. 93-5349 (and consolidated cases) (D.C. Cir. filed June 26, 1995).

[6]Indeed, most cable operators are already predisposed to ban any type of programming on access channels they can. As the government concedes (at 17), "operators may be generally reluctant to provide access capacity" at all. Moreover, pursuant to 47 U.S.C. §§ 532(d)(1) and 532(b)(4), an operator is permitted to utilize unused time on both its public and leased access channels to programming of its own choosing and for its own pecuniary benefit. Thus, the more the cable operator bans pursuant to Section 10, the more it is able to reduce its access obligations and instead carry its own programming. The United States simply ignores these provisions when it asserts (at 17) that cable operators' hostility toward access "does not suggest that, once obligated

In short, when considered as a whole, there can be little doubt that the Section 10 statutory scheme will "significantly encourage" cable operators to advance the government's objective of reducing the amount of indecent speech carried on access. In this regard, the Section 10 scheme is no different from the drug-testing regulations at issue in *Skinner*: Congress, as Senator Wirth bluntly put it, "g[a]ve a very clear signal to the cable companies," 138 Cong. Rec. S650, that they should prohibit indecent programming; it has paved the way to censorship by clearing away the "legal barriers" in the form of contrary state laws and franchising agreements; and it has reserved for the FCC a "participat[ory]" role in the censorship scheme as the arbitrator of disputes about the definition of indecent. See 489 U.S. at 615-16.

Despite these parallels, the United States continues to deny the applicability of *Skinner* because, the government contends (at 21), "the federal regulations in *Skinner* took two significant additional steps": (1) the regulations gave the government the right to obtain the drug test results, *i.e.*, a benefit; and (2) the regulations provided that if an employee refused to take a test, he was to be withdrawn from work, *i.e.*, coercion directed at the employee.

But both of these so-called "additional steps" are present in the Section 10 scheme. First, the government receives a benefit from a cable operator's decision to ban indecent programming. Section 10's purpose, according to the FCC, is "reducing the exposure of viewers, especially children, to 'indecent' programming on cable access channels." App. 187a. Every time a cable operator bans an indecent program, that goal is furthered. Second, the Section 10 statutory scheme includes a coercive element: if a cable programmer refuses to certify that its program is decent, then a cable operator shall not be required to show the program. App. 172a.

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to provide a set number of access channels, they will be more or less likely to permit indecent access programming."

D. Public Access Channels Are Electronic Public Fora.

The United States makes no effective response to the demonstration in our opening brief (at 32-35) that (1) public access channels are public fora created by local governments in exchange for cable operators' use of public rights-of-way, insofar as *all* members of the public have the right to express themselves about any subject on a first-come, first-served basis; and (2) that any attempt by the federal government to impose content-based distinctions on these locally-created fora requires First Amendment scrutiny.[7]

The United States' argument that a public access channel is private property is unavailing. As we explained in our opening brief (at 32-35), it is simplistic to describe a public access channel as private property when a local government insists that the public has an unfettered right to use the channel for expressive activity – just as the public has a right to use streets and sidewalks for expressive activities, notwithstanding that title may technically lie with the abutting landowner. Likewise, the government's citations (at 23 n.9) to *Hudgens* v. *NLRB*, 424 U.S. 507 (1976) and *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), are inapt, because there is no suggestion in either case that the *government* (as opposed to a private party) dedicated the private property at issue to public use.

Finally, the United States misses the point when it argues (at 23) that a local government's requirement that a cable operator provide a public access channel imposes a common carrier-like obligation on the cable operator rather than creating a public forum. Regardless of what label is applied to access channels,

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[7] The United States mischaracterizes (at 22) our argument as a contention that "private cable systems [are] 'public forums.'" Likewise, the NCTA, amicus Time Warner, and others seem to insinuate that we argue that a leased access channel is a public forum. Our argument, however, is that a *public* access channel provides a public forum. In addition, the NCTA makes the puzzling suggestion (at 12) that public access is only available to "a *limited category* of users." Petitioners are at a loss to understand how the public is a limited category of users.

Congress's attempt to impose content-based distinctions must be subject to strict First Amendment scrutiny.[8]

II. SECTION 10 MUST UNDERGO STRICT SCRUTINY.

A. There Is No Justification for the Unprecedented Standard of First Amendment Scrutiny Proposed by the United States.

It is a fundamental principle of First Amendment jurisprudence that any attempt by the government to single out categories of speech for disfavored treatment based upon content is presumptively unconstitutional and will be tolerated only if it can survive strict scrutiny. See, *e.g.*, *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-18 (1991); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 229-31 (1987). Just two terms ago, in *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445 (1994), a case that specifically addressed the cable medium, this Court reiterated that content-based laws require "the most exacting scrutiny." *Id.* at 2459.

The United States concedes (at 25) that Section 10 "distinguish[es] among categories of speech based on content." The government nonetheless, for the first time, argues that Section 10 should be subjected not to strict scrutiny, as is mandated for all content-based laws, indeed not even to intermediate scrutiny, which is required for content-*neutral* laws, but to an even lesser standard of scrutiny: reasonableness and viewpoint-neutrality.

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[8]Thus, the United States' citation (at 23-24) to *Information Providers' Coalition* v. *FCC*, 928 F.2d 866 (9th Cir. 1991), and *Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987), for the proposition that telephone companies are not state actors and therefore are not bound by the First Amendment is wholly inapt in this context, since we are addressing Congress's responsibilities, not those of cable operators. However, to the extent the United States argues, based upon these cases, that the state could enact a law mandating that an individual had a right to telephone service, but conditioning that right upon the individual's speech being of a certain content, such a law would of course be subject to constitutional scrutiny as a content-based regulation.

The United States attempts (at 25) to justify this radical departure from established precedent based upon the non-sequitur that Section 10 "does not restrict the overall ability of the public to engage in free expression" because its provisions "limit programmers' expressive activity only insofar as – and to precisely the same extent as – they expand that of the operators." This makes no sense. Free speech is not a zero-sum game in which one person's rights may be curtailed so long as someone else's are equally enhanced. Indeed, the government's calculus ignores entirely the "crucial" right of adult cable viewers "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

Moreover, content-based restrictions on speech are pernicious, and they are no less so simply because the government tries to restrict a category of speech by singling it out for censorship, and delegating the task of pulling the trigger to a private party under the guise of enhancing editorial freedom, instead of censoring on its own. Simply stated, the government should not be in the business of deciding what types of protected speech are and are not appropriate for discussion. "If the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'" *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 537-38 (1980) (citation omitted); see also *Turner*, 114 S. Ct. at 2458 ("At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

For that reason, Section 10 is a classic example of a law that must be evaluated under strict scrutiny. Section 10 bestows upon cable operators the power to censor only a limited category of speech disfavored by Congress, in a medium – access channels – where local governments have historically denied cable operators any editorial control. As a result, some access programming is now subject to censorship only because Congress has deemed it unworthy.

The government makes no effort to distinguish this Court's long line of precedents that demand strict scrutiny for content-

based laws. Instead, the government lists (at 25) a string of citations, implying that these cases and concurrences represent a *separate* line of precedents supporting the use of a lesser standard of review for content-based statutes that adjust rights among private parties. As we explain below, those cases stand for nothing of the sort and certainly do not suggest that this Court should depart from strict scrutiny here.

The United States cites first to *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995), where this Court observed that when the state creates a limited public forum – that is, when the state opens its property for the public to use for a specific purpose – it may limit the speech permitted in that forum to that which is consistent with that purpose. *Rosenberger* thus stands for the unremarkable proposition that a state "'may legally preserve the property under its control for the use to which it is dedicated.'" *Id.* at 2516 (citation omitted). In other words, *Rosenberger* pertains exclusively to forum analysis, and in this case the United States has refused to concede that access channels provide any type of public forum.[9] Even leaving aside this impediment, nowhere does *Rosenberger* suggest that a new standard of review should be applied to content-based laws like Section 10. The other opinions relied upon by the United States are equally inapposite.[10]

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[9]The United States' reliance on *Rosenberger* is misplaced even in that limited context, however. Local governments, not the federal government, created the public fora provided by public access channels, and these local governments did not limit them to "decent" speech, but rather dedicated them as *unlimited* public fora open to *all* speech, regardless of content. *Rosenberger* certainly provides no justification for the federal government intruding upon local governments' decisions in these matters.

[10]Two of the cited cases (*International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672 (1992), and Justice Scalia's concurrence in *Burson* v. *Freeman*, 504 U.S. 191 (1992)) deal with preserving the integrity of *nonpublic* forums – that is, government property that is neither by tradition nor designation devoted to public expression. Those interests are not at stake here, as it is beyond dispute that access channels were created specifically for public expression. The United States' reliance on *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992), where the Court held that the state may make content-based distinctions between types of obscenity, which is *unprotected* by the First

In sum, the United States has presented no rationale or authority to justify abandoning this Court's long line of precedents requiring strict scrutiny of content-based laws. Accordingly, the Court should reject the United States' invitation to rewrite First Amendment doctrine.

B. Section 10 Does Not Cure Other Constitutional Problems.

The NCTA (at 7) and amicus Time Warner (at 20-23) suggest that access requirements infringe on cable operators' First Amendment rights, and that Congress, by giving cable operators censorial power over one limited category of speech while maintaining the existing protection for all other speech on access channels, has somehow alleviated that infringement.[11]

These arguments have no merit. Content-neutral access requirements do not offend the Constitution, but if it were the

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Amendment, *id.* at 390, is similarly misplaced. Unlike obscenity, indecent speech is protected by the First Amendment, making the *R.A.V.* reasoning inapplicable. The United States also cites to Justice Stevens' concurrence in *R.A.V.*, which states that viewpoint-based restrictions are even more pernicious than content-based restrictions. But the fact that the government may engage in even worse evils than enacting content-based laws does not justify abandoning the strict scrutiny standard for reviewing such laws. Finally, the government also cites to *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), again without any explanation of its relevance. *Broadrick* deals with the overbreadth doctrine, however, not the level of scrutiny to be applied to content-based statutes, and thus has no applicability here.

[11]It bears emphasizing that this case involves a challenge to Section 10 and its implementing regulations, and not a challenge to the provisions of the 1984 Act that relate to cable access requirements. The 1984 Act provisions, which have been in operation for more than a decade, were recently upheld against a constitutional challenge brought by Time Warner. *Daniels Cablevision, Inc.* v. *United States*, 835 F. Supp. 1 (D.D.C. 1993), *appeal pending sub nom. Time Warner Entertainment Co.* v. *FCC*, No. 94-5349 (D.C. Cir., argued Nov. 20, 1995). Though Time Warner now suggests (at 30) that if this Court finds Section 10 unconstitutional, it should also strike down the underlying leased access provision that Section 10 amends in the 1984 Act, it has long been understood that a preexisting statute will not be struck down based on defects in an amendment. *Frost* v. *Corporation Comm'n*, 278 U.S. 515, 527 (1929); *Davis* v. *Wallace*, 257 U.S. 478, 485 (1922).

case that the 1984 Act's access channel provisions unconstitutionally burdened the First Amendment rights of cable operators, Section 10 would not save those provisions. To the contrary, Section 10 would exacerbate any such constitutional problems. By authorizing cable operators to censor indecent speech while simultaneously preserving the existing blanket prohibition on censorship of any other type of speech, Section 10 transforms cable operators' obligations from a content-neutral requirement that they carry *all* speech without regard to content to a content-based requirement that they carry the speech favored by the government, *i.e.*, non-indecent speech. *Turner* discussed precisely such a situation when it contrasted the content-neutral must-carry requirements of the 1992 Act, which required only intermediate scrutiny, with the content-based rights of access which required strict scrutiny and were struck down in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) and *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986). *Turner* made clear that compelling a private party to act as a conduit for speech of a certain content raises grave constitutional problems not present when a private actor is required to act as a conduit without regard to content. See 114 S. Ct. at 2464-65.[12]

C. The Speech Covered by Section 10 Deserves Full First Amendment Protection.

The government (at 26-28), as well as a number of amici, appear to suggest that indecent speech should be afforded less protection under the First Amendment than other speech. This Court should reject this suggestion for a number of reasons. As a preliminary matter, this Court held in *Sable Communications*

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[12]For this reason, the government errs in suggesting (at 26) that "there would be no constitutional impediment to a federal statute authorizing cable operators, at their discretion, to confine programming on access channels to coverage of politics and world events [and] not to permit the use of access channels for music or sports shows." To the contrary, this Court's decisions in *Turner*, *Tornillo*, and *Pacific Gas* suggest that unlike a content-neutral access requirement, compelling a private party to carry a message of a particular content requires strict scrutiny.

of California, Inc. v. *FCC*, 492 U.S. 115 (1989), that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Id.* at 126. Nowhere did the Court suggest that indecent speech deserves less protection. To the contrary, the Court applied precisely the same test it would apply to any attempt by the state to "regulate the content of constitutionally protected speech": whether the regulation used the "least restrictive means" "to promote a compelling [state] interest." *Id.*[13]

Moreover, although the term "indecent" may carry with it a negative connotation, an examination of how Section 10 defines the term confirms that indecent speech is entitled to full protection under the First Amendment. The definition consists of two elements. First, the speech must be "patently offensive as measured by contemporary community standards."[14] But as this Court admonished in *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991):

> "As we have often had occasion to repeat: [T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. If there is a

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[13]In support of its unprecedented contrary proposal, the United States once again relies upon a string of inapt or nonbinding opinions: two plurality opinions (*Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560 (1991), and *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976)); two cases involving minors – rather than adults – exclusively (*Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675 (1986), and *Ginsberg* v. *New York*, 390 U.S. 629 (1968)); a case that has never been applied outside the broadcast medium (*FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978)); and a case in which the statute at issue was not content-based (*City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

[14]Contrary to the government's characterization (at 44 n.24) of our vagueness argument, although this Court's precedents permit federal regulation of obscenity on a national scale, they do not permit the imposition of a *national* community standard of offensiveness, as the FCC purports to impose, but rather require that offensiveness be judged by *local* community standards. See *Sable*, 492 U.S. at 124-25; *Hamling* v. *United States*, 418 U.S. 87, 105-07 (1974); *Miller* v. *California*, 413 U.S. 15, 30 (1973) (describing a "*national* 'community standard'" for offensiveness as "an exercise in futility.").

> bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 118 (citations and internal quotation marks omitted); see also, *e.g.*, *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983).

Second, the speech must describe or depict "sexual" activities. But as this Court made clear in *Roth* v. *United States*, 354 U.S. 476 (1957), nothing about this topic makes it less deserving of constitutional protection. *Id.* at 487.

Moreover, even if one were to accept the government's argument that some types of speech are inherently more or less "valuable" than others, Section 10's definition of indecency is so broad that it would potentially restrict programming of significant value to cable viewers. Unlike the definition of obscenity, see *Miller* v. *California*, 413 U.S. 15, 24 (1973), Congress and the FCC's definition of "indecent" does not require that the speech appeal to the prurient interest, nor does it require that the speech lack serious literary, artistic, political, or scientific value. Nor does the definition include any requirement, as the United States seems to assert (at 27 n.14), that the speech "assault[] the viewer or listener." Thus, access programs – such as the ones on health and sex education we described (at 9) in our opening brief – that describe "sexual activity," and that some viewers might find offensive, but that did *not* appeal to the prurient interest, did *not* assault the viewer, and *did* have serious literary, artistic, political, or scientific value, would arguably fall within the government's definition of indecency and be subject to Section 10's regulatory scheme. Although this programming may be controversial to many, it is far from, as Judge Wald put it, "material that borders on obscenity – 'obscenity lite.'" App. 45a. It is

precisely this type of programming that petitioners fear will be censored from access channels under Section 10.[15]

D. The Rationale in *FCC* v. *Pacifica* Should Not Be Extended to the Cable Medium.

In its effort to avoid strict scrutiny of Section 10(b), the United States argues that the reasoning of *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), justifies a more lenient, but unspecified, standard of review. This Court has rejected previous attempts to apply *Pacifica* outside the broadcast medium and should similarly reject that effort here. In *Sable*, for example, the United States argued that this Court should apply *Pacifica*'s reasoning to uphold regulation of telephone indecency. Recognizing *Pacifica* as an "emphatically narrow holding," this Court refused to do so. 492 U.S. at 127; see also *Bolger*, 463 U.S. at 74 (refusing to apply the *Pacifica* rationale to sexually explicit mail).

Notwithstanding *Sable* and *Bolger*, and having not made the argument below, the United States now proposes that the Court extend *Pacifica* to the cable medium and apply some undefined but lesser standard of scrutiny to indecent speech appearing there. This new standard apparently would apply to *all* cable programming, and not merely that appearing on access channels. As *Pacifica* itself cautions, however, "each medium of expression presents special First Amendment problems." 438 U.S. at 748; see also *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 501 (1981); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975). And, as this Court noted in *Bolger*, "the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a

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[15]The United States' statement (at 46) that the FCC "err[s] on the side of determining that material is not legally indecent" provides absolutely no reassurance. It is not the FCC but cable operators who will make the decision whether material is indecent under Section 10, and the test is not whether the FCC would find the material indecent but rather whether a cable operator would "reasonably believe[]" it to be so. Section 10(a). Indeed, Section 10's certification regulations exacerbate the problem, since access programmers will have to guess at what a cable operator would "reasonably believe[]" to be indecent.

justification for regulation of other means of communication." 463 U.S. at 74 (footnote omitted). Indeed, in *Turner Broadcasting System* v. *FCC*, 114 S. Ct. 2445 (1994), this Court recognized the enormous technological differences between the broadcast and cable media, and on that basis rejected the government's argument that the "regulation of cable television should be analyzed under the same First Amendment standard that applies to regulation of broadcast television." *Id.* at 2456-57. Furthermore, the Court in *Turner* unequivocally stated in the context of the cable medium that content-based laws require the "most exacting scrutiny." *Id.* at 2459.

Moreover, *Pacifica*'s rationale rested primarily on two characteristics of broadcasting: that it is intrusive, and that it is uniquely accessible to children. 438 U.S. at 748-49. The broadcast medium differs from the cable medium, however, both in its intrusiveness and its availability to children, chiefly by virtue of the technological means offered by the cable medium but unavailable (at least at the time the Court decided *Pacifica*) in the broadcast medium for the viewer to keep out unwanted programming. As we explained in our opening brief (at 9-11), strong, uncontroverted record evidence shows that lockboxes offer the cable subscriber one easy method of avoiding unwanted programming. Not only that, but the recently passed Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the 1996 Act"), makes clear that there is an additional means of protecting children. Pursuant to section 504 of the 1996 Act, a cable viewer may request that the cable operator scramble any channel to which the viewer does not wish to subscribe. Finally, a viewer may simply choose, as have some forty percent of the public, not to subscribe to cable at all. Given the technological means to ameliorate the supposed intrusiveness and accessibility to children present in the broadcast medium, there is no justification for extending *Pacifica*'s rationale to the cable medium.

E. Section 10 Fails the Least Restrictive Means Test.

In our opening brief, we showed (at 36-41) that neither Section 10's authorization of censorship nor its mandatory

blocking provision could withstand the least restrictive means test mandated under strict scrutiny. The government does not dispute (and in fact conceded below) that an outright ban could not be the least restrictive means of protecting children. It does, however, argue that Section 10(b)'s mandatory blocking scheme survives strict scrutiny. As we now show, that argument relies upon factual misstatements and ignores this Court's unambiguous holding in *Sable*.

First, throughout its brief, the United States repeatedly and erroneously asserts that Congress considered and rejected the existing lockbox requirement as an alternative to Section 10(b)'s mandatory scheme.[16] Congress did no such thing. Nowhere in the legislative history of Section 10 is there any *mention* – let alone evidence of reasoned consideration – of the existing lockbox requirement or any other alternative means of achieving Congress's supposed objective. Nor does the statutory text of the 1992 Act, which contains extraordinarily detailed findings of fact on other issues, say anything about lockboxes.

Second, the United States (at 38), as well as several supporting amici, try to sustain the constitutionality of Section 10(b) by transforming the *least restrictive* means test into a *most effective* means test. But as we explained in our opening brief (at 41), this Court explicitly rejected that approach in *Sable*. See 492 U.S. at 130 (fact that "a few of the most enterprising and disobedient young people would manage to" circumvent system does not make a more restrictive approach constitutional).

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[16]See, *e.g.*, United States' Br. at 11 ("*Recognizing* that inertia or lack of knowledge would keep many parents from [using lockboxes], Congress *found* . . .") (emphasis added); *id.* at 36 ("Congress *recognized* in passing the 1992 Cable Act [that] Section 10(b) constitutes the only effective means . . .") (emphasis added); *id.* at 37 ("As Congress *recognized*, many parents . . . would fail to [use lockboxes]") (emphasis added).

In addition, the United States makes a number of extra-record suppositions about parents' propensity to use lockboxes, but nowhere does the government explain why it does not simply make a greater effort to inform parents of lockboxes' availability and ease of use.

In any event, as we explained in our opening brief (at 10-11), every examination of lockboxes has inescapably led to the conclusion that they "effectively restrict the availability of [unsuitable or unwanted] programming, particularly with respect to child viewers, without infringing the First Amendment rights of the cable operator, the cable programmer, or other cable viewers." H.R. Rep. No. 934, 98th Cong., 2d Sess. 70 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4707. Moreover, the new 1996 Act reveals the availability of other means that are less restrictive than mandatory blocking. Section 504 of the 1996 Act, for example, permits a viewer to request the scrambling of any channel to which the viewer does not wish to subscribe. This provision is less restrictive than Section 10's content-based provision because it does not entail the government making content-based distinctions between categories of speech, but instead leaves the choice entirely where it belongs – with the viewer.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and Section 10 and the regulations promulgated thereunder should be struck down as violative of the First Amendment.

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